No. 287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

VICTOR RABINOWITZ AND LEONARD B. BOUDIN,
Petitioners,

v.

ROBERT F. KENNEDY, *Attorney General of the United States*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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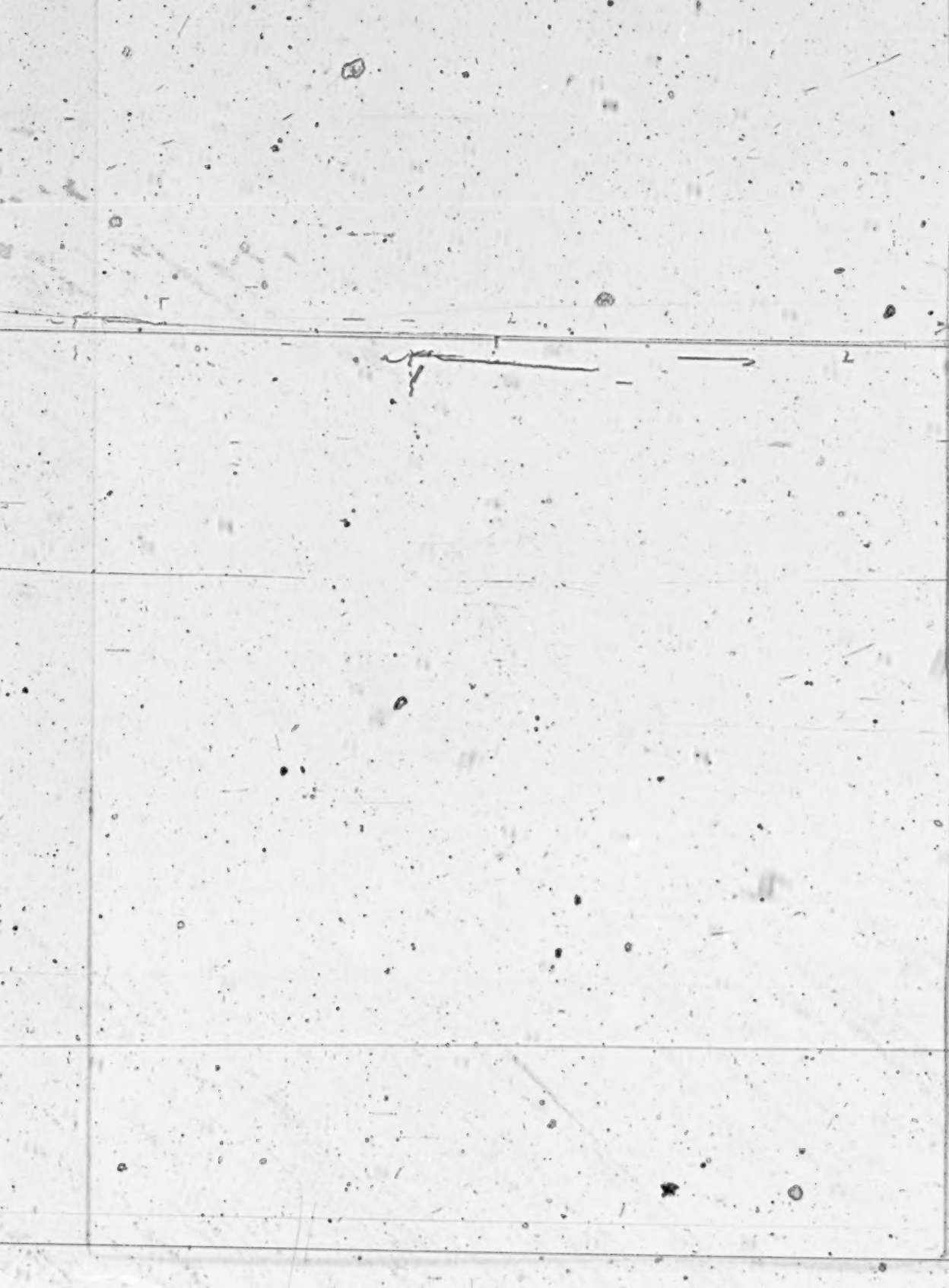

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Petitioners pray for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which reversed a judgment of the United States District Court for the District of Columbia denying respondent's motion for judgment on the pleadings.

OPINION BELOW

The District Court issued no opinion. The opinion of the Court of Appeals has not as yet been reported and is appended hereto as Appendix A. The judgment is appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1963 (R. 48). A timely petition for rehearing was denied on May 1, 1963 (R. 47). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S. Code, section 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioners, a law firm who represent a foreign government in purely mercantile and financial matters, and accordingly, are not required to register under the Foreign Agents Registration Act, may bring a declaratory action to challenge the Attorney General's demand that they register under that Act; or whether they are relegated to the alternatives of complying with the unlawful demand or submitting themselves to the hazards of an indictment and prosecution for failing to register.

2. Whether such a declaratory judgment action is a suit against the United States.

STATUTES INVOLVED

Foreign Agents Registration Act (Act of June 8, 1938; 52 Stat. 634; 22 U.S.C. 611 et seq., as amended: Section 611(a)):

As used in and for the purpose of this subchapter—

* * * * *

(b) The term "foreign principal" includes—

(1) a government of a foreign country and a foreign political party;

* * * * * *

(c) Except as provided in subsection (d) of this section, the term "agent of a foreign principal" includes—

(1) any person who acts or agrees to act, within the United States, as, or who is or holds himself out to be whether or not pursuant to contractual relationship, a public-relations counsel, publicity agent, information-service employee, servant, agent, representative, or attorney for a foreign principal;

(2) any person who within the United States collects information for or reports information to a foreign principal; who within the United States solicits or accepts compensation, contributions, or loans, directly or indirectly from a foreign principal; who within the United States solicits, disburses, dispenses, or collects compensation, contributions, loans, money, or anything of value, directly or indirectly, for a foreign principal; who within the United States acts at the order, request, or under the direction of a foreign principal;

* * * * * *

Section 612

(a) No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement and supplements thereto as required by this section 2(a) and section 2(b) hereof or unless he is exempt from registration under the provisions of this subchapter.

Section 613

The requirements of section 612(a) of this title shall not apply to the following agents of foreign principals;

* * * * * *

(d) Any person engaging or agreeing to engage only in private, nonpolitical, financial, mercantile, or other activities in furtherance of the bona fide trade or commerce of such foreign principal

* * * * * * *

Section 618

(a) Any person who—

(1) Willfully violates any provision of this subchapter or any regulation thereunder,

* * * * * *

(2) . . . shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both.

Declaratory Judgment Act (62 Stat. 964 as amended; 28 U.S.C. 2201):

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

The petitioners are members of the bar of the State of New York, engaged in the general practice of law under the firm name of Rabinowitz & Boudin. On or about September 10, 1960, petitioners were retained by the Republic of Cuba to represent that government in purely mercantile and financial matters; their retainer does not cover advice and representation involving public relations, propaganda, lobbying or political or other non-legal matters and the petitioners have not in fact represented the Republic of Cuba in any respect other than in mercantile and financial matters (R. 4-5).

In August of 1961, the respondent, the Attorney General, demanded that petitioners register with him in accordance with the provisions of the Foreign Agents Registration Act of 1938, as amended, herein called the Act. The petitioners maintained that their representation of the Republic of Cuba did not fall within the purview of the Act and so informed respondent. The respondent, nevertheless, insisted and continues to insist on his demand that petitioners register (R. 5).

Thereafter, the petitioners filed in the District Court below a complaint for a declaratory judgment declaring that their activities as representatives of the Republic of Cuba as set out in the complaint and as described above do not subject them to the requirements of registration under the Act (R. 4-7). The complaint alleged (R. 6) that these activities do not fall within the purview of the Act and are specifically exempted from the registration requirement of the Act by section 3(d) thereof, 22 U.S.C. § 613(d).

Attached to the complaint as Exhibit A (R. 8-16) is the registration form adopted by the Attorney General

and which petitioners would be required to complete in order to fulfill the registration requirements of the Act. This form would require petitioners to disclose all of their businesses, occupations and public activities without regard to any relationship of these activities to their representation of the Republic of Cuba. Petitioners would be required to list all of their law clients and any other outside activities which they may have outside their law business and all talks, speeches, radio broadcasts which they may have made or articles or books which they may have written. The form also would require the petitioners to list all of their stockholdings or any other pecuniary interests in any corporation or any business enterprise, again without regard to whether or not these corporations or business enterprises had any relation to the representation of the foreign principal.

The complaint further alleged (R. 5) that the petitioners found it necessary to retain counsel in other states in connection with litigation in courts throughout the country. Attached to the complaint as Exhibit B was the Attorney General's Form No. FA-4 (R. 17-19) which respondent would require to be filed by all counsel associated with petitioners. This form would require all associate counsel to disclose all visits to foreign residences in foreign countries within the past 5 years; all clubs, societies, committees or other non-business organizations in the United States or elsewhere, of which they have been members, directors, officers or employees during the past 2 years; a brief description of all other businesses, occupations or business activities in which they are engaged; all speeches, lectures, talks, radio and television broadcasts delivered during the past 3 months and "all newspapers,

magazines, articles, books, pamphlets, press releases, radio and television programs and scripts, and other publications distributed by them or by others for them, or in the preparation and distribution of which [they] rendered any services or assistance, during the past 6 months."

The complaint alleged that this registration requirement constituted a serious invasion of petitioners' privacy and that it would interfere with the petitioners' practice of law since other lawyers whom they would wish to employ or retain might refuse to accept such employment or retainer at the price of incurring a similar invasion of their privacy (R. 6). The complaint concluded that the petitioners were faced with the dilemma of submitting themselves to this unlawful invasion of their privacy as a result of the unlawful demand of the Attorney General or in the alternative, resisting the demand and facing indictment and prosecution and possibly even conviction, if they were wrong in their judgment as to the law, for refusing to register. The complaint further alleged that indictment and prosecution, even without more, would seriously damage petitioners' reputation and interfere with their practice of law and their ability to employ and retain associate counsel (R. 6).

The Attorney General filed an answer in which he admitted that petitioners had been retained to represent the Republic of Cuba in its mercantile and financial interests, but denied any knowledge as to whether or not the representation went beyond the mercantile and financial interests of the foreign principal (R. 22). The answer further admitted that the Attorney General had demanded that petitioners register under the Foreign Agents Registration Act, that he had rejected

petitioners' claim that they do not fall within the purview of the Act, and that he continued to insist that petitioners register. The answer further alleged that the failure of the petitioners to register as demanded subjected them to indictment, prosecution, and the imposition of criminal penalties (R. 22). The answer also specifically put in issue the legal question as to whether or not the activities of petitioners brought them within the purview of the Act (R. 22).

Respondent then moved for judgment on the pleadings, and his motion was denied by the trial court (R. 24-5). Subsequently, on respondent's motion consented to by the petitioners, the trial court amended its order, certifying, in accordance with 28 U.S. Code § 1292(b) that its order "involves a controlling question of law, as to whether individuals requested to register under the Foreign Agents Registration Act of 1938, as amended, may have their rights adjudicated by a declaratory judgment suit, . . . and that immediate appeal of this order may materially advance the ultimate termination of the litigation." (R. 27.) Thereafter the Court granted respondent's application for permission to appeal from the District Court's order (R. 28), and reversed that order, holding that petitioners' action was a suit against the United States, Judge Fahy dissenting (R. 30-39). A timely petition for rehearing en banc (R. 40-46) was denied (R. 47).

REASONS FOR GRANTING THE WRIT

1. The decision below expanded the doctrine of sovereign immunity to an unprecedented degree and applied it in a fashion inconsistent with the decisions of this Court. Since the District of Columbia is the forum for the bulk of the litigation challenging the

validity of actions by government officials, the application of the sovereign immunity doctrine by the Court of Appeals for the District is of special importance.

According to the ruling of the majority below, except in the case of a challenge to the constitutionality of a statute, no suit can ever be brought against a government official which might affect a criminal prosecution. The majority regarded this as an inflexible rule which must be applied in all cases, regardless of the equities of the suit and all other considerations, legal or policy, which might justify bringing the action. According to the majority, such a suit is one against the sovereign because it would "interfere with the public administration." The majority cited no authority either in this Court or in any other court for this extreme view. On the contrary, its decision is directly contrary to the decision of this Court in *Shields* v. *Utah Idaho R. R. Co.*, 305 U.S. 177. That case involved a challenge to a finding by the Interstate Commerce Commission that a railroad came within the scope of the Railway Labor Act. Under the statutory scheme, the railroad, if subject to the Act, was required to post certain notices, and the failure to do so subjected it to criminal penalties. The railroad sued to enjoin the United States Attorney from prosecuting it. The lower courts and this Court entertained jurisdiction of the action, the Court stating as follows at 183:

> "Disobedience is immediately punishable and it is made the duty of the United States Attorney to institute proceedings against violators. Respondent has invoked the equity jurisdiction to restrain such prosecution and the Government does not challenge the propriety of that procedure. Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted,

> even though the complaint seeks to enjoin the bringing of criminal actions. . . . [W]e think respondent was entitled to resort to equity in order to obtain a judicial review of the validity and effect of the Commission's determination purporting to fix its status."

The Court did not consider that the doctrine of sovereign immunity or of a suit against the United States was even present in the case, although there was no question that the suit was being brought against the United States Attorney in his official capacity.[1]

Moreover, the lower court's unthinking application of the formula that suits are barred as unconsented suits against the United States where a judgment might "interfere with the public administration"[2] cannot possibly be squared with the number of cases in which both this Court and the court below have taken jurisdiction of suits challenging the validity of action by government officials. On the contrary, ever since

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[1] Despite the clear contradiction between the *Shields* case and the ruling of the court below, the court made no effort to discuss or distinguish the case. This can hardly have been due to an oversight, since the case was cited to the court and, in accordance with its Rule 17(b)(3) marked with an asterisk as a case chiefly relied upon by petitioners.

[2] The phrase was taken from an opinion of Justice Douglas which rejected the defense of sovereign immunity, *Land* v. *Dollar*, 330 U.S. 731, 738. Nothing in the context of that case, or in any other case in this Court, justified the application given to the formula by the court below. Compare the prophecy made with respect to similar language employed in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682: "The use of mechanical and unrealistic language, as in *Larson*, presents the danger that lower courts will rely on words and ignore underlying policies." *Sovereign Immunity and Specific Relief Against Federal Officers* (Note) 55 Colum. L. Rev. 74, 82. Unfortunately, this prophecy was fulfilled in the present case.

this Court's decision in *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, it has been accepted without question that the courts have jurisdiction over suits challenging the validity of actions taken by government officials. And in *Stark* v. *Wickard*, 321 U.S. 288, this was referred to as "the familiar principle that executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternative remedy."

Applying that "familiar principle", both this Court and the court below have, as a matter of course, assumed jurisdiction of multifarious suits challenging the validity of actions by government officials and indistinguishable in principle or theory from the present case. See e.g. action challenging the application of a test which would exclude the import of tea, *Waite* v. *Macy*, 264 U.S. 606; actions challenging the refusal of the Secretary of State to issue passports, *Perkins* v. *Elg*, 307 U.S. 325; *Kent* v. *Dulles*, 357 U.S. 116; suits challenging the validity of the discharge of government employees, *Service* v. *Dulles*, 354 U.S. 363, *Vitarelli* v. *Seaton*, 359 U.S. 535; *Cole* v. *Young*, 351 U.S. 536; *Peters* v. *Hobby*, 349 U.S. 338; *United Public Workers* v. *Mitchell*, 330 U.S. 75; *Deak* v. *Pace*, 185 F. 2d 997; *Born* v. *Allen*, 291 F. 2d 345; or the validity of a resignation from the Air Force, *Ingalls* v. *Zuckert*, 309 F. 2d 659; an action challenging the character of an Army discharge, *Harmon* v. *Brucker*, 355 U.S. 579; an action challenging the authority of the Civil Service Commission to classify hearing examiners, *Ramspeck* v. *Fed. Trial Examiners*, 345 U.S. 128; an action challenging the validity of regulations giving veterans priority in retention in the government service, *Hilton* v. *Sullivan*, 334 U.S. 323; actions challenging the leases

of public lands *Chapman* v. *Sheridan-Wyoming Coal Co.*, 328 U.S. 621; *Morgan* v. *Udall*, 306 F. 2d 799; *Carl* v. *Udall*, 309 F. 2d 653; an action challenging discretionary action by a Parole Board, *Davis* v. *Board of Parole*, 306 F. 2d 801.

All of these were cases in which the government officials were sued in their official capacity, and in which judgments for the plaintiffs would unquestionably have "interfered with the public administration." Nevertheless, jurisdiction was assumed without question and without discussion of the question of sovereign immunity. The court below, however, made no effort to distinguish the general run of cases in which jurisdiction was assumed from the present case, or to indicate the considerations either of policy or logic which would justify the exercise of jurisdiction in those cases but not in the present.

Significantly, in many of these cases, the relief requested was denied, the court holding that the challenged action was validly taken. Under abstract logic, a holding that the action of the government official was validly authorized implies that it was the action of the sovereign, and theoretically, the court could have dismissed the action for lack of jurisdiction because of sovereign immunity. However, since under this view, the question of sovereign immunity and the lawfulness of the government official's action was the same question, the courts wisely dispensed with such semantics.[8]

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[8] See Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 Harv. L. Rev. 1479, 1480-1 (1962). See also Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 88, 77th Cong., 1st Sess. 80-82 (1941).

The doctrine of sovereign immunity has its impact only where it bars, as in the present case, consideration as to whether the challenged governmental action was valid. We pointed out to the court below that this Court has applied or considered the doctrine in that manner only in situations where the suit brought was for specific performance of a government contract, for government funds or for specific property in the possession of the government, see, e.g., *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371; *Land* v. *Dollar*, 330 U.S. 731; *Larson* v. *Domestic & Foreign Corporation*, 337 U.S. 682. That the doctrine is so limited was recognized by this Court in its most recent case on the subject, *Malone* v. *Bowdoin*, 369 U.S. 643, 646, 649-50; cf. *Ickes* v. *Fox*, 300 U.S. 82. And even the court below has on more than one occasion recognized that the doctrine was limited to cases of this character. See *Clackamas County, Ore.* v. *McKay*, 219 F. 2d 479, 491; *Story* v. *Snyder*, 184 F. 2d 454, 456; *Udall* v. *States of Wisconsin, Colorado, and Minnesota*, 300 F. 2d 790, 792; *West Coast Exploration Co.* v. *McKay*, 213 F. 2d 582. The same view has been taken by numerous commentators in the field.[4]

However, without any analysis of the cases, the court below blandly rejected the contention with the statement: "We are not aware that the doctrine of sovereign immunity is so circumscribed;" citing four

[4] See Byse, *op. cit. supra* at 1485-6, 1528; Comment, 8 Stanford Law Rev. 683, 684-6 (1956); Davis, *Sovereign Immunity in Suits Against Officers for Relief Other than Damages*, 40 Cornell L. Q. 3, 19-20 (1954); Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 Journal of Public Law 1 (1960); *The Sovereign Immunity Doctrine and Judicial Review of Federal Administrative Actions* (Note), 2 U.C.L.A. Law Rev. 382, 383 (1955). See also *Farrell* v. *Moomau*, 85 F. Supp. 125.

cases in this Court which in fact involved suits either for government funds or for specific property in the possession of the government.[5] The only case relied upon which does not fall in that category was a recent decision of the Court of Appeals, *Reisman* v. *Caplin*, 317 F. 2d 123. In the *Reisman* case, the court found that an action against the Commissioner of Internal Revenue was an unconsented suit against the United States because it was prematurely brought, intimating that the result might be different if the plaintiff's only recourse were a suit against the Commissioner. Although the lower court's decision in *Reisman* appears to have been based on a complete non sequitur,[6] it should be contrasted with the decision in the present case which is based on no reasoning at all and in which petitioners are denied relief, although their action is not premature and they have no other available remedy.[7] Significantly, Judge Fahy who was the author of the opinion in the *Reisman* case, dis-

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[5] The cases cited were *Land* v. *Dollar, supra; Ex Parte State of New York, No. 1*, 256 U.S. 490; *Larson* v. *Domestic & Foreign Commerce Corp., supra;* and *Stanley* v. *Schwalby*, 147 U.S. 508.

[6] Obviously, if a case is prematurely brought, it should be dismissed on that ground, and not on the ground of sovereign immunity.

[7] Cf. the similar non-sequitur of the Court of Appeals in *Fay* v. *Miller*, 183 F. 2d 986. In this latter case, the court held that a suit to restrain action by the U.S. Attorney was an unconsented suit against the United States, because plaintiffs were able to obtain all necessary relief through a suit against a third party. In the *Fay* opinion, the court reasoned that *Larson* was held to be an unconsented suit against the United States because the plaintiffs there had an adequate remedy in the Court of Claims. If, as intimated in the *Fay* case, the sovereign immunity doctrine is applicable only when a plaintiff has some other adequate remedy then it should not have constituted a bar to relief in the present case.

sented in the present case. More significantly, two other circuits have considered the claim of sovereign immunity in situations identical to that of *Reisman* to be completely without substance, *De Masters* v. *Arend*, 313 F. 2d 79; *Application of Colton*, 291 F. 2d 487, and on June 17, this Court granted certiorari in the *Reisman* case, No. 1084, Oct. Term, 1962.[8]

This Court has repeatedly observed that the doctrine of governmental immunity from suit is in disfavor, and that accordingly the general trend is to narrow the scope of the doctrine, see e.g. *Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 391; *National City Bank* v. *Republic of China*, 348 U.S. 356, 359, a view shared by virtually all commentators in the field, see e.g. Byse, *op. cit. supra;* 3 Davis, *Administrative Law Treatise* (1958) ch. 27; Gellhorn & Byse, *Administrative Law Cases & Courts* (4th ed. 1960) 354-5; Comment, 8 Stanford Law Review 683, 692-3 (1956); Davis, *Sovereign Immunity in Suits Against Officers for Relief Other than Damages*, 40 Cornell L. Q. 3, 25, 35-39 (1954); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity* (1953), 13 La. L. Rev. 476; Davis, *Suing the Government by Suing An Officer*, 29 U. of Chi. L. Rev. 435 (1962); Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 Journal of Public Law 1 (1960); Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 401, 420, 433 (1958); Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 Fordham L. Rev.

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[8] On the common issue in *Reisman* and the present case, the government's opposition to the petition for a writ of certiorari stated only the following (at p. 6): "The court of appeals held that petitioners' action was barred by sovereign immunity. This holding admittedly raises questions of some difficulty."

1, 17 (1959). In the light of this trend to restrict the doctrine, the lower court's expansion of the doctrine was especially unwarranted. Moreover, any expansion of the doctrine should be done only on the basis of some rational and significant policy considerations, and not on the basis of a mechanical application of an inapplicable formula, as was done below.[9]

As matters now stand, all that can be said of the doctrine as applied by the court below, is that sometimes it bars suits and sometimes it doesn't, and one guess is as good as another. There are no criteria and no grounds for determining when the doctrine applies and when it doesn't; the cases are apparently resolved on the basis of whim or caprice.[10]

Obviously the question as to when a suit against a government official must be dismissed for lack of juris-

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[9] See *Malone* v. *Bowdoin*, *supra* at 650 (dissenting opinion); Byse, *op. cit. supra* at 1530; Gellhorn & Byse, *op. cit. supra* at 354-5.

[10] Subsequent to its decision in the present case, the court below, without discussion of the question of sovereign immunity, assumed jurisdiction of a suit against the Secretary of Defense by a group of Navy employees who asked the court to hold that they were entitled to be transferred to certain jobs in the Navy Department, *McNamara et al.* v. *Dick et al.*, No. 17,216, decided May 16, 1963. Granting the relief requested would unquestionably have "interfered with the public administration" of the Navy Department. The court, nevertheless, considered the question on the merits and, reversing the district court, held that, under the applicable statutes and regulations, the employees were not entitled to the jobs to which they laid claim. See also *Division 1267 etc.* v. *Ordman*, No. 17,649, decided June 13, 1963, in which the court held that the General Counsel of the Labor Board had not abused his discretion by refusing to issue a complaint, and *Josey* v. *Board of Parole*, No. 17,243, decided June 13, 1963, in which the court directed the Board of Parole to hold a hearing.

diction because it is an unconsented suit against the United States is a vital and important one which requires clarification by this Court.

2. The lower court not only extended the sovereign immunity doctrine to a new and unprecedented area, but it applied the doctrine in a novel and unprecedented fashion. In the *Larson* case, this Court held that the sovereign immunity doctrine will not bar a suit which challenges the government official's action as being beyond his statutory powers, although it will bar a suit when the action taken is within the official's powers even if the action involved an error of law. This test is admittedly difficult to apply,[11] but it does permit the

[11] For critisims of the test as being unrealistic and almost impossible to apply in practice, see Byse, *op. cit. supra* at 1485-8; Gellhorn & Byse, *Administrative Law Cases & Courts* (4th ed. 1960) 354-55; Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis* (1960) 9 J. Pub. L. 1, 12-13; Jaffé, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 433-437; Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 Fordham L. Rev. 1, 15-17 (1959); Davis, *Suing the Government by Suing an Officer*, 29 U. of Chi. L. Rev. 435 (1962); Davis, *Sovereign Immunity in Suits Against Officers for Relief Other than Damages*, 40 Cornell L. Q. 3 (1954). And from the very inception of the doctrine, this Court has consistently noted that its own decisions in the field could not be reconciled. See *Cunningham* v. *Mason & Brunswick R.R. Co.*, 109 U.S. 446, 451; *Brooks* v. *Dewar*, 313 U.S. 354, 359-60; *Land* v. *Dollar*, 330 U.S. 731, 738; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 698. The most recent comment on this point was in the dissenting opinion in the *Malone* case, *supra* at 650:

> "This Court is quite correct in saying that all of our decisions in this field cannot easily be reconciled; and the same will doubtless be true if said by those who sit here several decades hence."

For a discussion of the cases and their inconsistencies, see 3 Davis *Administrative Law Treatise* (1958), Ch. 27, pp. 545-616.

courts to entertain some suits against governmental officials. But, as interpreted by the court below, in the absence of a challenge to the constitutionality of a statute, virtually every case brought against a government official would be barred by the sovereign immunity doctrine.

The present action was brought against the Attorney General in his capacity as the government official charged with the administration of the Foreign Agents Registration Act. Petitioners alleged that since the Act expressly exempted the petitioners' activities from its coverage, the respondent's demand that they register exceeded his statutory authority.[12] To this, the court below replied that the respondent, as Attorney General, had the statutory authority to construe the statute and that included the authority to construe it erroneously. If this reasoning is to prevail, no case

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[12] The contention of the majority below that the complaint did not allege that the Attorney General had exceeded his statutory powers is plainly both captious and inconsistent with Rule 8(f) of the Federal Rules of Civil Procedure which provides that "All pleadings shall be so construed as to do substantial justice." See *Maty* v. *Grasselli Chemical Co.*, 303 U.S. 197, 200; *Conley* v. *Gibson*, 355 U.S. 41, 48; 2 Moore's Federal Practice (2d ed.) 1895. The complaint plainly alleged that petitioners were expressly exempted from the requirement of registration under the Act (R. 6). Since Rule 8 of the Federal Rules requires that pleadings contain "a short and plain statement" of the case, there was certainly no need for petitioners to add to their complaint the legal argument that because they were expressly exempted from the Act, therefore the demand for their registration exceeded the statutory authority granted by the Act to the Attorney General. "The Federal Rules have done away with the narrow 'theory of the pleadings' doctrine . . . . [A] party is not required to pick and stick to one theory of law," 2 Moore's Federal Practice (2d ed.) 1713-14. The validity of a complaint must be judged on the basis of the facts alleged, not on how it argues the law.

can ever be brought in which the claim that a government official acted outside his authority can be sustained. Every government official has the authority and responsibility to construe, in the first instance, the statutory powers conferred upon him. And it may be assumed that in all cases where the claim is made that he is exceeding his authority, the official is in good faith contending that he is not, and the issue is an arguable one that requires judicial resolution. But the formula adopted by the court below that the official has the statutory authority to construe his statutory authority erroneously would in effect preclude all judicial review and oust the courts of jurisdiction at the threshold.[13]

Admittedly the formula of the *Larson* case is ambiguous and difficult of application. But as applied below, the formula has no content whatever and would serve to bar any suit against a government official.

3. The decision below nullifies the Congressional intent as expressed in the Declaratory Judgment Act. As shown by the dissenting opinion, the present case meets all the requirements for declaratory relief as provided for in the Act. And the legislative history of

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[13] This view that a good faith construction of his statutory powers exempts a government official from judicial review of the validity of his actions was rejected by this Court as long ago as 1902, see *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 110-11:

> "Although the Postmaster General had jurisdiction over the subject-matter . . . and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, yet such a decision, being a legal error, does not bind the courts."

Cf. *Wilbur* v. *United States ex rel Krushnic*, 280 U.S. 306; *Harmon* v. *Brucker*, 355 U.S. 579.

the Act shows that it was designed to cover just such cases as the present.[14]

In an article reviewing the early history of the Declaratory Judgment Act, Prof. Borchard, who is generally acknowledged as the author of the Act[15] wrote as follows (Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 Yale L.J. 445, 461 (1943)):

> "Possibly in no branch of litigation is the declaration more useful than in the relations between the citizen and the administration. With the growing complexity of government and the constantly increasing invasions of private liberty, with ever widening powers vested in administrative boards and officials, the occasions for conflict and dispute are rapidly augmenting in frequency and importance. Yet the very fact that such disputes turn mainly upon questions of law, involv-

[14] See S. Rep. 1005, 73rd Cong. 2d Sess., pp. 2-3:

"The [Declaratory Judgment] procedure has been especially useful in avoiding the necessity, now so often present of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate a statute in order to obtain a judicial determination of its meaning or validity. Compare *Shredded Wheat Co.* v. *City of Elgin*, (284 Ill. 389, 120 N.E. 248, 1918), where the parties were denied an injunction against the enforcement of a municipal ordinance carrying a penalty, and were advised to purport to violate the statute and then their rights could be determined, with *Erwin Billiard Parlor* v. *Buckner* (156 Tenn. 278, 300 S.W. 565, 1927) where a declaratory judgment under such circumstances was issued and settled the controversy."

And page 6 of the Report quoted with approval as underlying the purposes of the Declaratory Judgment Act the language of this Court in *Terrace* v. *Thompson*, 263 U.S. 197, 216:

> "They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights."

[15] See .e.g. S. Rep. 1005 cited *supra* at p. 2.

> ing the line marking the boundary between private liberty and public restraint, between private privilege and immunity, on the one hand, and public right on the other, make this field of controversy peculiarly susceptible to the expeditious and pacifying ministration of the declaratory judgment. . . . The liability to be tried as a criminal is no 'remedy' but a hazard, which the law should help the much regimented citizen avoid by construing and interpreting inhibiting statutes in a civil proceeding where possible."[16]

With regard to the applicability of the Declaratory Judgment Act to the present case, the majority below stated: "Philosophically, we may agree. But the Congress has decreed otherwise, at least so far as agents representing foreign governments are concerned." The opinion, however, does not state where or how Congress has so "decreed." There is in fact, no Congressional action which bars relief for petitioners. On the contrary, Congress intended such a remedy under the Declaratory Judgment Act, and the only bar to relief is the action of the court below.

Nor are there any equitable considerations which can justify the denial of relief. The Attorney Gen-

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[16] See also Borchard, *Declaratory Judgment* (2d ed. 1941) 906, 1020-1021; Borchard, *The Federal Declaratory Judgments Act*, 21 Virginia L. Rev. 35, 40, 43, 49-50 (1934). For an exhaustive discussion of the cases involving suits for injunctive or declaratory relief and challenging the validity or applicability of penal statutes, see the two part article by Professor Davis, Davis, *Ripeness for Judicial Review*, 68 Harv. L. Rev. 1122, 1327 (1955), particularly 1145-1153. Prof. Davis distilled from the cases the following rule: Except where the case is otherwise not ripe for judicial review, "A statute or a regulation which is enforceable through criminal prosecution should be subject to challenge in a suit for injunction or declaratory judgment brought by a party who is immediately confronted with the problem of complying or violating; risk of criminal penalties should not be exacted as the price of challenge," at 1368.

eral is not entitled to, nor should he desire petitioners' registration if they are not required to register under the terms of the Act. And if the petitioners have been, as we contend,[17] expressly exempted by Congress from the coverage of the Act, it does not "interfere with the public administration" for a court so to declare. On the other hand, there is certainly no equity in the argument that petitioners should be compelled to register, even though the law does not require them to, under a threat of a criminal prosecution without first being afforded the opportunity of obtaining a judicial declaration on the validity of respondent's demand that they register.

CONCLUSION

Certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

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Attorney for Petitioners

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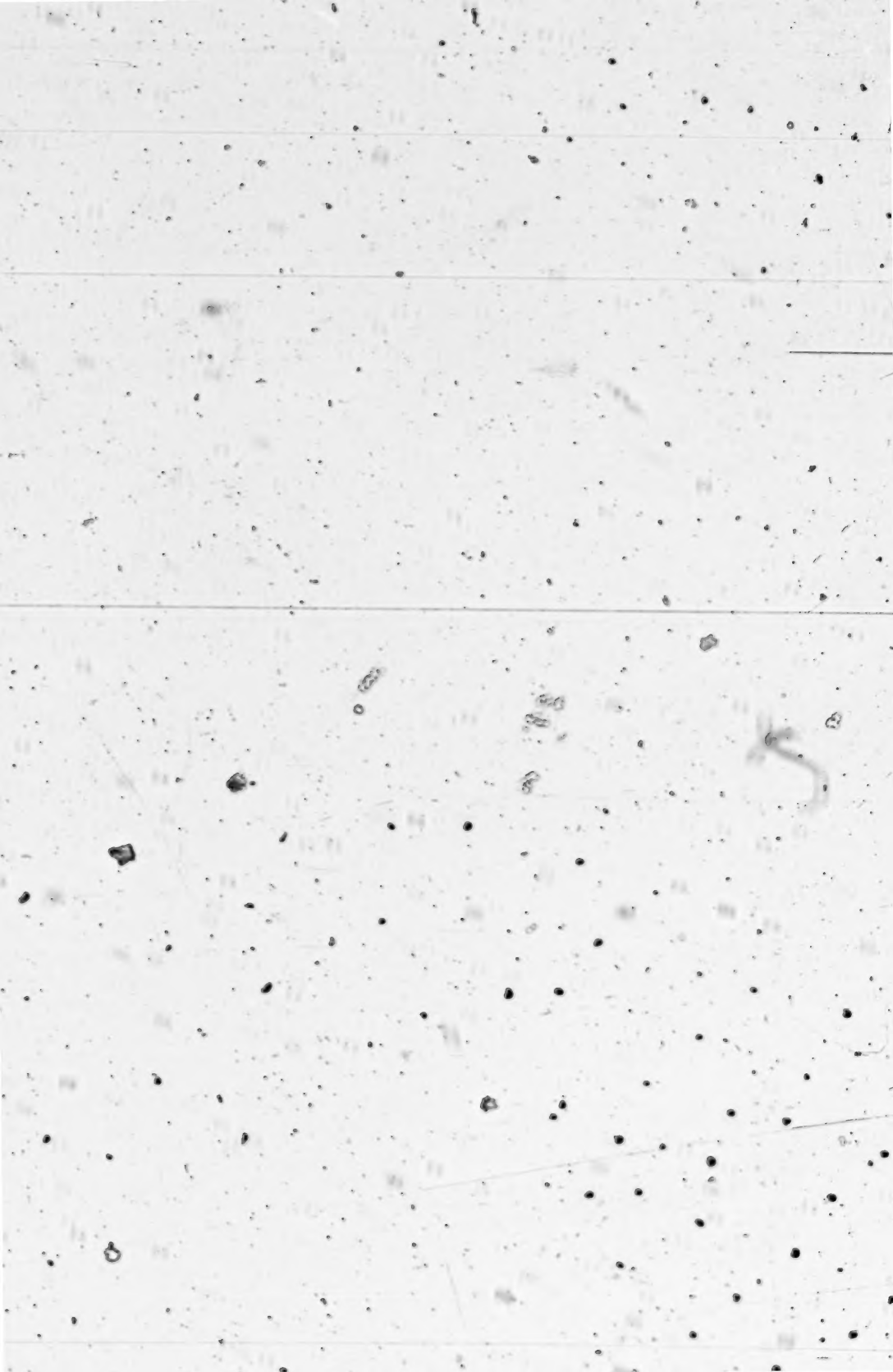
[17] Although the issue on the merits as to whether petitioners are required to register is not before the Court, it is pertinent to note that the legislative history of the Foreign Agents Registration Act establishes that Congress was concerned with registration by foreign agents in the area of propaganda or public relations and not where the representation of the foreign principal is limited to its mercantile and financial interests. See *Viereck* v. *United States*, 318 U.S. 236, 241-247 where this Court reviewed the legislative history of the Act. See also H. Rep. No. 1381, 75th Cong., 1st Sess. at p. 2; H. Rep. No. 1547, 77th Cong., 1st Sess., at p. 4: "The basic theory of the Act [is to require] complete disclosure by agents of foreign principals subject to registration who are engaged in propaganda and kindred enterprises . . ." so that "the recipients of such propaganda can properly appraise its worth."

APPENDIX



APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,105

ROBERT F. KENNEDY, Attorney General of the United States, APPELLANT

v.

VICTOR RABINOWITZ AND LEONARD B. BOUDIN, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided April 4, 1963

Mr. George B. Searls, Attorney, Department of Justice, for appellant.

Mr. David Rein for appellees.

Before WILBUR K. MILLER, FAHY and WRIGHT, *Circuit Judges.*

WRIGHT, *Circuit Judge:* The Foreign Agents Registration Act[1] provides criminal penalties[2] against anyone who represents a foreign government in this country and fails to register with the Attorney General. Certain exceptions are provided.[3] Appellees are attorneys at law representing the Republic of Cuba who have been requested by the Attorney General to register pursuant to the Act. Instead of registering, appellees filed this declaratory judgment action, alleging that since their representation of Cuba is limited to "legal matters, including litigation, involving the mercantile and financial interests of the Republic of Cuba," they are exempt from registering under Section 3(d)[4] of

[1] 52 Stat. 631, as amended, 22 U.S.C. §§ 611 *et seq.*

[2] 52 Stat. 633, as amended, 56 Stat. 257, 22 U.S.C. § 618.

[3] 52 Stat. 632, as amended, 56 Stat. 254, 22 U.S.C. § 613.

[4] 52 Stat. 632, as amended, 56 Stat. 254, 22 U.S.C. § 613(d).

the Act. They pray for a judgment so declaring. In effect, therefore, this proceeding is an effort to restrain the Attorney General from prosecuting appellees under the Act. The District Court denied appellant's motion for judgment on the pleadings and certified this action for appeal.[5]

The threshold question is presented by the venerable, but creaking, doctrine of sovereign immunity. There is no suggestion that the United States has consented to this suit or that the Attorney General is being sued as an individual. Indeed, the named defendant is "The Attorney General of the United States," the name of the current office holder not being included.[6] Consequently, the action, if maintainable at all, must fit the fiction created by *Ex parte Young*, 209 U.S. 123 (1908). There it was held that where an officer acts unconstitutionally, "he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 160. Since in such circumstances the officer is theoretically being sued as an individual, the doctrine of sovereign immunity provides no bar. Thus a fiction is indulged to circumvent sovereign immunity.

Ex parte Young, supra, has spawned a welter of cases, all seeking to get under its umbrella.[7] The confusion which ensued has been to some extent relieved by the holding in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682 (1949), reiterated in *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), that an officer of the United States may indeed be sued in his individual capacity where the officer's action is "not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." 337 U.S. at 702 and 369 U.S. at 647.

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[5] 28 U.S.C. § 1292(b).

[6] The Attorney General's name first appeared on the appeal papers in this court.

[7] See 3 Davis, Administrative Law, ch. 27 (1958).

It is not alleged in the complaint that prosecution of the appellees under the Act would be unconstitutional[8] or outside the Attorney General's statutory powers.[9] Appellees' primary argument on the unconsented suit point seems to be that "the doctrine that a suit against a government officer in his official capacity may be a suit against the United States applies only in the situation where the suit is either for government funds or for specific property in the pos-

[8] In arguing that this is an appropriate case for declaratory judgment, appellees assert that the penalties are so severe that they dare not await prosecution. Therefore, they assert, a civil forum must be available or the Act can never be tested. A civil forum may be available under these circumstances, for this argument may raise a constitutional question. *Yakus* v. *United States*, 321 U.S. 414, 438 (1944); *Ex parte Young*, *supra*, 209 U.S. at 145-148. Appellees, aided by competent counsel, for reasons best known to themselves, have decided not to raise the constitutional issue. Under the circumstances, and for the purposes of this motion, we accept appellees' pleadings as presented.

[9] Appellees do argue in their brief that their activities "are expressly exempted from the Act by the terms of the Act itself" and that to this extent appellant's demand that they register is "in excess of his statutory authority." The Attorney General, however, is charged with enforcement of all the criminal laws of the United States, 28 U.S.C. § 507. Such duty obviously carries with it the authority to construe the individual statutes and apply them to the facts before him. At most, appellees' claim is that appellant has erred, or will err, in construing the law. But the relief for which appellees here pray "can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." *Larson* v. *Domestic & Foreign Corp.*, *supra*, 337 U.S. at 690. See also *United States* v. *Thompson*, 251 U.S. 407, 413 (1920); *Goldberg* v. *Hoffman*, 7 Cir., 225 F. 2d 463 (1955); *Fay* v. *Miller*, 87 U.S. App. D.C. 168, 171, 183 F. 2d 986, 989 (1950); *United States* v. *One 1940 Oldsmobile Sedan Automobile*, 7 Cir., 167 F. 2d 404 (1948); *District of Columbia* v. *Buckley*, 75 U.S. App. D.C. 301, 304, 128 F. 2d 17, 20 (1942), *cert.* denied, 317 U.S. 658 (1942); *United States* v. *Segelman*, W.D. Pa., 86 F. Supp. 114 (1949); *United States* v. *Brokaw*, S.D. Ill., 60 F. Supp. 100 (1945).

session of the government." We are not aware that the doctrine of sovereign immunity is so circumscribed. If "the 'essential nature and effect of the proceeding' may be such as to make plain that the judgment sought would • • • interfere with the public administration," the suit is one against the sovereign. *Land* v. *Dollar*, 330 U.S. 731, 738 (1947), citing *Ex Parte State of New York, No. 1*, 256 U.S. 490, 500, 502 (1921).[10] Obviously, restraining the Attorney General from enforcing the criminal laws of the United States would "interfere with the public administration."

Appellees rely heavily on Professor Borchard in arguing that civil procedure should be substituted for criminal procedure in the area not involving moral turpitude, particularly "where there is grave uncertainty as to what practices the general terms of a law prohibit." Borchard, Declaratory Judgments (2d Ed. 1941), p. 1021. They also assert with Professor Borchard "that one of the main and most beneficial functions of declaratory judgment procedure is as a substitute for criminal prosecutions in the area of regulation of business practices." Philosophically, we may agree. But the Congress has decreed otherwise, at least so far as agents representing foreign governments are concerned. Consequently, since appellees have failed to challenge the constitutionality of the Act, on its face or as applied, or the authority of the Attorney General to enforce it, this case should be dismissed on the pleadings as an unconsented suit against the United States.

So ordered.

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[10] See also *Larson* v. *Domestic & Foreign Corp.* *supra*, Note 9, at 688; *Stanley* v. *Schwalby*, 147 U.S. 508 (1893); *Reisman* v. *Caplin*, —— U.S. App. D.C. ——, —— F. 2d —— (No. 16,690, decided 2/7/63), p. 4, slip opinion.

FAHY, *Circuit Judge, dissenting:* The suit does not seem to me to be one to enjoin a criminal prosecution, which equity ordinarily will not entertain. The Foreign Agents Registration Act is not such a criminal statute as is involved in cases which illustrate the equitable doctrine. It is primarily a regulatory statute, with a penalty of not more than $10,000 fine, or imprisonment for not more than five years, or both, for willful violation of any of its provisions. Section 618(a). It is not a crime to be a foreign agent, but to act as one unless a specified registration statement is filed, or unless one "is exempt from registration under the provisions of this subchapter." Section 612(a). Appellees allege that they are within the statutory exemption of "any person engaging or agreeing to engage only in private and nonpolitical financial or mercantile activities in furtherance of the bona fide trade or commerce of such foreign principal. . . ." Section 613(d). They allege that they are lawyers and that their representation of Cuba is limited to "legal matters, including litigation, involving the mercantile and financial interests of the Republic of Cuba," that their retainer does not cover advice or representation involving public relations, propaganda, lobbying, or political or other non-legal matters, and that they have not advised, represented, or acted on behalf of Cuba in any such matters. The answer of appellant alleges that he does not have sufficient information to form a belief as to the truth of these allegations respecting matters other than legal. Appellant denies, however, that appellees come within the exemption and has insisted that they file the registration statement. In this situation the District Court, I think properly, denied appellant's motion for judgment on the pleadings.

Since the Attorney General is responsible for administering and enforcing the statute, appellees were under the necessity either of filing the detailed information required by registration statement and acquiescing in the status attributed to them by appellant, or of being criminally

prosecuted and risking the statutory penalties, unless they could secure a declaratory judgment as to their status. There is more in this situation than the impact upon appellees of the mere existence of the statute, and more too than a mere difference of opinion. There is a demand and insistence by appellant that they file the registraiton statement. A case or controversy—a justiciable issue—thus arose. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227 (1937).

The suit is not accurately described as one to enjoin a criminal prosecution. It is to determine the existence of an obligation on appellees' part affirmatively to register in circumstances which create a justiciable issue in that regard. No administrative remedy is provided and there is no remedy at law comparable in adequacy to that available through the Declaratory Judgment Act. See *Greene* v. *McElroy*, 360 U.S. 474 (1959). The Act combines with equity to afford a remedy, for equity is served by not forcing registration in the face of well-founded doubt of the need to do so, until that doubt is resolved—a doubt which we must assume in the present posture of the case is held in good faith. See *Terrace* v. *Thompson*, 263 U.S. 197 (1923). The thrust of the suit is presently too far removed from an effort to enjoin a criminal prosecution to come within the principle adverted to under which equity sometimes denies itself jurisdiction. This principle long antedated the Declaratory Judgment Act and when now invoked should be considered in conjunction with that Act.[1]

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[1] Appellant cites *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943), and *Watson* v. *Buck*, 313 U.S. 387 (1941), both of which, however, involved efforts to have a federal court enjoin state action, which turn upon different considerations. Nor are *Eccles* v. *Peoples Bank*, 333 U.S. 426 (1948); *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), and *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450 (1945), also cited, controlling because no real controversies were presented for declaratory judgment in those cases (except of course as to the federal employee in *Mitchell* who alleged that he had been engaging in political activity said to be covered by the Act.)

Nor, as it seems to me, is the suit one against the United States within the sovereign immunity doctrine which protects the Government, without its consent, from judicial interference in the disposition of its property or in its appropriate functioning. *Reisman* v. *Caplin*, —— U.S. App. D.C. ——, —— F.2d —— (1963). The American approach to this doctrine has not precluded suits against officials acting in excess of constitutional or statutory authority. See, *e.g.*, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951). Appellees do not claim, however, that the statute is unconstitutional, so the question narrows to whether the effort of the appellant to require appellees to register is within his statutory authority as that concept has been used in defining the sovereign's immunity. See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). The Attorney General has general authority and responsibility for administering this statute as well as for enforcing federal law generally. But there is a question—a judicial question—on the pleadings in this case as to his authority to require appellees to register. True it is that his insistence that they do so is within his authority in the sense that he is entitled to make a decision bearing upon his administration of the statute, as officials generally are entitled to do in corrying out their responsibilities; but even though such a decision becomes a first step in setting in motion the processes of government, when it gives rise to a controversy such as we have here the basis for the immunity disappears.[2] For in such circumstances a suit against an officer of the United States neither affects the disposition of property as in *Larson* nor, as in *Reisman*, interferes in an unwarranted manner with the functioning of government (the "public administration" of *Land* v. *Dollar*, 330 U.S. 731 (1947)).

[2] The existence of a justiciable controversy does not fall away because the decision has not been pursued further during the pendency of this litigation.

Unlike the situations in either *Larson* or *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), this suit does not require the appellant to do or not to do anything. In *Larson* an injunction was sought prohibiting the Administrator of the War Assets Administration from selling certain property to anyone but plaintiff, who claimed to have a valid contract to buy it from the Administrator. The Court referred to "no allegation of any statutory limitation" on the Administrator's powers as a sales agent. In *Malone* the action sought to eject a Government officer from land which he occupied under claim of title from the United States. Referring to *Larson* the Court pointed out that there "the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator's powers." In our case appellees rely upon a congressionally built-in exemption which is a limitation upon the statutory authority of appellant.

The suit is designed to ascertain what the statute contemplates. If appellees are held to come within the exemption the law is vindicated. If they are found not to come within the exemption appellant remains free to proceed as he deems advisable. In neither case does the suit seek to require appellant to act affirmatively, to surrender property, or even to stay his hand except as understandable self-restraint leads him to do so at present. The Government does not contend that declaratory judgments may never be entered against officers of the United States or that an express consent to be sued is always necessary. See *Greene* v. *McElroy, supra,* where there was no discussion of the immunity doctrine; *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* where the Court sustained jurisdiction and negated the possibility of immunity; and *United Public Workers* v. *Mitchell, supra.*[3]

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[3] The Supreme Court has said: "Courts of Justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rigths in controversy between them and the government. . . ." *United States* v. *Lee,* 106 U.S. 196, 220 (1882).

The exemption provision is contained in the statute itself and must be construed howsoever the status of appellees is determined. For this purpose the Declaratory Judgment Act is peculiarly appropriate. Of course that Act is not a waiver of sovereign immunity, but it is a means of determining the issue upon the resolution of which the application of the immunity turns.

The lines of the immunity doctrine are elusive. As this court suggested in *Reisman*, policy considerations are strong determinants in cases raising the problem. The majority opinion in this case does not discuss the policy reasons which serve to justify the result reached. It seems to me desirable to encourage judicial settlement of a legal dispute free from the coercive effect of penal sanctions when the dispute arises out of a regulatory statute like the one before us.[4] As indicated above the dispute presents a justiciable issue. Accordingly there was no abuse of discretion in retention of jurisdiction by the District Court to decide whether to give a declaratory judgment. I would therefore affirm.

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[4] A leading authority has indicated that courts have been too uncritical and unanalytical in their application of the doctrine, with its exceptions created in *Ex parte Young*, 209 U.S. 123 (1908). See 3 *Davis, Administrative Law*, pp. 545-576 (1958).

In his dissenting opinion in *Larson*; Mr. Justice Frankfurter took occasion to say: "'Sovereign Immunity' carries an august sound. But very recently we recognized that the doctrine is in 'disfavor'. [Citing *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245 (1940)]. It ought not to be extended . . . ." 337 U.S. at 723.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

No. 17,105

Civil 3729-61

ROBERT F. KENNEDY, Attorney General of the United States, APPELLANT

v.

VICTOR RABINOWITZ AND LEONARD B. BOUDIN, APPELLEES

Appeal from the United States District Court for the District of Columbia

Before: WILBUR K. MILLER, FAHY and WRIGHT, *Circuit Judges.*

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order ..... of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court with directions to dismiss the case on the pleadings as an unconsented suit against the United States.

Per Circuit Judge Wright.

Dated: April 4, 1963.

Separate dissenting opinion by Circuit Judge Fahy.